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# CONTEMPT POWERS OF THE ADMINISTRATIVE LAW JUDGE

Joyce Krutick Barlow <sup>1</sup>

## Introduction

It is the purpose of this article to explore the law concerning the inherent contempt powers possessed by an Administrative Law Judge (ALJ) and the extent of this power, and to propose statutory and regulatory changes that would codify these powers. <sup>2</sup>

## Conduct of the Hearing by the ALJ

It is well established that an Administrative Law Judge has the right and the *duty* to control the conduct of the hearing. Moreover, the manner in which the hearing is conducted rests in the sole discretion of the Administrative Law Judge. <sup>3</sup> The Administrative Conference of the United States, in its Manual For Administrative Law Judges, indicates that:

The Judge *must* control the hearing. As soon as the subject under inquiry is exhausted or fully developed, the Judge should stop counsel or the witness and direct him to go to other matters. If a question or an answer is irrelevant or improper, the Judge should strike it without waiting for an objection. <sup>4</sup>

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<sup>2</sup> The writer gratefully acknowledges the assistance of Judge Ronnie A. Yoder of the Department of Transportation who, in the early stages of the writer's research on this subject, provided copies of his own decisions and other useful material.

<sup>3</sup> See *Butz v. Economou*, 438 U.S. 478 (1978); *Richardson v. Perales*, 402 U.S. 389 (1971); *Association of Admin. Law Judges v. Heckler*, 594 F.Supp. 1132 (D.D.C. 1984).

<sup>4</sup> M. Ruhlen, Manual For Administrative Law Judges 62 (rev. ed. 1982) (emphasis added).

While an ALJ has the duty to control the hearing, counsel has a duty to maintain the dignity of the judicial or administrative tribunal.<sup>5</sup> In some states, attorneys must acknowledge this duty when taking the oath of office. An excellent example is the Oath of Admission To The Florida Bar. Each member is sworn to "maintain the respect due to courts of justice and judicial officers."<sup>6</sup> Two questions arise from the consideration of these basic concepts: what constitutes a violation of counsel's duty to maintain the dignity of judicial proceedings, and what power does an Administrative Law Judge have to punish such violations?<sup>7</sup>

### Contempt Defined

Contempt is generally defined as including "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator."<sup>8</sup> In *United States v. Seale*,<sup>9</sup> the court enumerated a four-prong test to determine whether conduct is punishable as contempt. The conduct must constitute misbehavior; it must reach a level which obstructs the administration of justice; it must be committed in the presence of the judge (or so close that it obstructs justice); and some intent to obstruct justice must be present.<sup>10</sup> Thus, it has been said that any action which is designed or

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<sup>5</sup> See Model Code of Professional Responsibility EC 7-36 (1980).

<sup>6</sup> The Oath of Admission appears in each monthly edition of The Florida Bar Journal.

<sup>7</sup> It has been suggested that punishment of attorney misconduct before an Administrative Law Judge might be effected through the use of state bar associations. However, it has been this writer's experience that when such attempts are made (at least within New Jersey) the Bar Association has been unwilling to involve itself, believing that judges ought to punish for contempt if contempt occurs. Perhaps in states with an integrated bar such as Florida such efforts may be more effective.

<sup>8</sup> *United States v. Seale*, 461 F.2d 345, 366 (7th Cir. 1972) (citing *Katz v. Murtagh*, 28 N.Y. 2d 234, 269 N.E. 2d 816, 321 N.Y.S. 2d 104 (1971)).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 367.

calculated to embarrass, hinder, or obstruct the judge in the administration of justice, or to lessen the court's authority or dignity, is a contempt.<sup>11</sup> Moreover, a contempt of court is "a disobedience to the court by acting in opposition to its authority, justice and dignity."<sup>12</sup>

In this author's opinion, all judges have the power to punish contemptuous conduct.<sup>13</sup> This has been ruled upon numerous times by the Supreme Court, and the Court has held that judges are required to exercise that power to preserve judicial decorum and to ensure the respectability of the legal profession.<sup>14</sup> In the words of Chief Justice John Marshall: "[I]t is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion ought to reside in the Court."<sup>15</sup>

This doctrine was restated in *ex parte Robinson*<sup>16</sup> as follows:

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power . . . . As thus seen the power of these courts in the punishments of contempts can only be exercised to insure order and decorum in their

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<sup>11</sup>*United States v. Ross*, 243 F.Supp. 496 (S.D.N.Y. 1965).

<sup>12</sup>*In re Mengel*, 201 F.Supp. 687, 689 (W.D. Pa. 1962).

<sup>13</sup>*See ex parte Burr*, 22 U.S. (9 Wheat.) 529 (1824).

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 530.

<sup>16</sup>86 U.S. (19 Wall.) 505 (1873).

presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes.<sup>17</sup>

In the context of all judges' inherent power to punish contempt it must be remembered that U.S. Administrative Law Judges are "functionally comparable" to trial judges.<sup>18</sup> Thus, while "sanctions available to federal administrative law judges may be more limited . . . the power to find and sanction contempt is no less important or real."<sup>19</sup>

Some legal scholars have postulated that Administrative Law Judges do not have contempt power. This is predicated largely upon the decision of the Supreme Court in *ICC v. Brimson*.<sup>20</sup> *Brimson* established the rule that agencies have no "authority to compel obedience to [their] orders by a judgment of fine or imprisonment."<sup>21</sup> However, as aptly pointed out by Chief Judge Robinson (Chief Judge of the Court of Appeals for the District of Columbia Circuit) in *Atlantic Richfield Co. v. United States Department of Energy*,<sup>22</sup> *Brimson* was decided at a time when the present administrative law system was unheard of. In addition, most of the scholarship on this issue has failed to distinguish between an Administrative Law Judge exercising a judicial function and an agency seeking to have a subpoena (issued pursuant to its investigative responsibilities) enforced. Moreover, Judge Robinson is perhaps one of the first jurists to recognize that *Brimson* "is wholly silent as to the power [of] an agency acting in an authorized judicial or quasijudicial capacity to impose sanctions *short of a fine or*

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<sup>17</sup>*Id.* at 510-11.

<sup>18</sup>*Butz v. Economou*, 438 U.S. 478, 513 (1978).

<sup>19</sup>R. Yoder, Lawyers' Responsibility Before Administrative Tribunals, presented at Federal Bar Association Seminar (Feb. 4, 1988).

<sup>20</sup>154 U.S. 447 (1894).

<sup>21</sup>*Id.* at 485.

<sup>22</sup>769 F.2d 771 (D.C. Cir. 1984).

*imprisonment* in order to compel compliance with discovery orders issued during the course of an adjudicatory proceeding." <sup>23</sup>

Since the creation of an extensive administrative law system, the courts have recognized the authority of Congress to delegate to such agencies the power to adjudicate certain claims between members of the public and the government. In fact, this authority was first recognized in *Brimson*. <sup>24</sup> This principle was reiterated in 1932 in the case of *Crowell v. Benson*. <sup>25</sup> It is this writer's contention that when taken together, *Benson*, *Brimson* and several other Supreme Court decisions which will be discussed *infra* establish without question that Administrative Law Judges sit in "legislative courts" and thus have all the powers available to judges of such courts, including the power to punish for contempt.

### **The Administrative Law Judge Presides Over a Legislative Court**

Legislative courts are courts created by Congress in conjunction with the exercise of its legislative powers. The Supreme Court first recognized the status of such courts in *American Insurance Co. v. 356 Bales of Cotton*. <sup>26</sup> Referring to the courts of the Territory of Florida, Chief Justice Marshall noted that such courts do not derive their power from the judicial power clause of the Constitution (article III) but rather from the power of Congress to exercise authority over the territories. <sup>27</sup>

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<sup>23</sup>*Id.* at 793 (emphasis in original).

<sup>24</sup>154 U.S. at 475-77.

<sup>25</sup>285 U.S. 22 (1932).

<sup>26</sup>26 U.S. (1 Pet.) 511 (1828).

<sup>27</sup>*Id.* at 546.

In 1929, the Court was called upon to determine whether the Court of Customs Appeals was a legislative or constitutional court.<sup>28</sup> Although the decision in that case holding this court to be a legislative court was later overruled,<sup>29</sup> it is important in that it further defines a legislative court. In the words of Mr. Justice Van Devanter:

[I]t long has been settled that article 3 does not express the full authority of Congress to create courts, and that other articles invest Congress with powers in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in section 2 of article 3 are called constitutional courts. They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers, and are prescribed by Congress independently of section 2 of article 3; and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior. . . .

Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.<sup>30</sup>

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<sup>28</sup> *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

<sup>29</sup> In 1962, the Court held that the Court of Customs Appeals was indeed a constitutional court. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). The Court did not, however, disturb that portion of its prior decision defining a legislative court.

<sup>30</sup> 279 U.S. at 449-51.

As was noted in *Bakelite*,<sup>31</sup> claimants before legislative courts do not have a right to sue unless Congress agrees to allow suit, and only then with such limitations as Congress chooses to impose. Thus, when Congress grants the privilege to sue, a claimant suing in a legislative court must abide by the conditions imposed.<sup>32</sup> In ultimately ruling that the Court of Customs Appeals was a legislative court, the Supreme Court recited the history of the Customs Court at length. It is noteworthy that there are striking similarities between the Customs Court and the tribunal presided over by Administrative Law Judges.<sup>33</sup> Initially, the Customs Court was known as the Board of General Appraisers. Later, Congress sought to make the Board a court by simply changing the name without altering its powers, duties or staffing. Essentially, the Customs Court was an executive agency which reviewed actions taken by appraisers and collectors who appraised and classified imported items and collected duties.<sup>34</sup>

Administrative Law Judges, whether they serve in the Office of Hearings and Appeals of the Social Security Administration, or for that matter, any other agency, preside over special tribunals created by Congress in the exercise of its legislative powers to hear matters that "admit of legislative or executive determination, and yet from their nature are susceptible of determination by courts."<sup>35</sup> Moreover, the relationship between these administrative law tribunals and the executive administration of specific statutes "shows very plainly that [they are] legislative" courts.<sup>36</sup>

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<sup>31</sup> See *id.* at 452.

<sup>32</sup> See *id.*

<sup>33</sup> See generally *id.* at 457-59.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 452.

<sup>36</sup> See *id.* at 459.



When one examines the statute from which Administrative Law Judges derive their power, it is abundantly clear that the ALJ has powers which are identical to those possessed by judges presiding over other courts. Thus, Congress specifically authorized the ALJ to preside over hearings.<sup>37</sup> Furthermore, the Supreme Court has twice held that the Administrative Law Judge has the duty to direct the course of the hearing.<sup>38</sup> Thus it is my view (and the view of other judges, both Administrative Law Judges and judges of courts of record) that the power to punish for contempt flows directly from the statutory power to conduct hearings and the duty to direct the course of those hearings.

It has generally been assumed that because subpoenas issued by administrative agencies must be enforced through district court enforcement proceedings, the judges serving in those agencies have no contempt power. It is important again to distinguish between the agency's investigative function and its judicial arm. One must look to Judge Robinson's holding in *Atlantic Richfield Co.* that administrative agencies do have the power to impose some types of sanctions.<sup>39</sup>

Perhaps the most common ground for fear of recognizing ALJ contempt power is that, because the ALJ serves in the executive branch of government, there is the threat of abuse. However, in this context it is important to note that, as the ALJ is appointed for life subject to removal for good cause, such fear is groundless. It is precisely this type of independence from improper influences which led the Supreme Court to hold in *Butz v. Economou*.<sup>40</sup>

We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages. The conflicts which federal hearing examiners seek

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<sup>37</sup> 5 U.S.C. § 556 (1988).

<sup>38</sup> See *Butz v. Economou*, 438 U.S. 478 (1978); *Richardson v. Perales*, 402 U.S. 389 (1971).

<sup>39</sup> 769 F.2d at 792-96.

<sup>40</sup> 438 U.S. 478.

to resolve are every bit as fractious as those which come to court . . . . Moreover, federal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process . . . .

There can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is "functionally comparable" to that of a judge. His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions . . . .

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.<sup>41</sup>

### **Sanctions Available to the ALJ**

What sanctions, then, may be imposed for contempt? As previously noted, the Administrative Law Judge's power to punish for contempt is, at present, more limited than that of other judges. However, sanctions are available. For example, in order to assure that flared tempers do not disrupt the proceedings, the ALJ may call a recess and leave the bench. In addition, when any person in the courtroom becomes "unruly" or expresses offensive remarks, the individual may be warned against repetition. Also, material may be physically stricken from the record as a sanction for contempt.<sup>42</sup> In cases of attorney contempt, the attorney may be excluded from further participation in the matter.<sup>43</sup> Lastly, disciplinary action against an attorney may be recommended to the agency.<sup>44</sup>

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<sup>41</sup>*Id.* at 512-14.

<sup>42</sup>M. Ruhlen, *supra* note 3, at 64.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

That these sanctions fall far short of what is required for the effective administration of the hearing process is abundantly clear. All too often the ALJ is faced with counsel who is obstreperous and/or contumacious. One way to deal with such conduct, in cases involving Social Security or SSI claims, would be to reduce the counsel's fee where there is a grant of benefits to the claimant. With the change in the statutory scheme for payment of fees, such a remedy is no longer available. Thus, in this author's opinion, the time has come for express codification of the Administrative Law Judge's implied power of contempt.

### **Proposed Legislative Changes**

It is this author's suggestion that 5 U.S.C. be amended to add a section that would read as follows:

An Administrative Law Judge appointed pursuant to this title shall have power to punish by fine, at the discretion of such Judge, such contempt of the Judge's authority, and none other, as -

(1) misbehavior of any person in the presence of the Administrative Law Judge, or so near as to obstruct the administration of justice; or

(2) disobedience or resistance to a lawful order, rule, command, or decision of the Administrative Law Judge.

The Administrative Law Judge shall have such assistance in carrying out his or her lawful order, rule, command, or decision as is available to a court of the United States.<sup>45</sup>

Regulations which would conform to each agency's practice ought to be enacted giving due consideration to the procedural format of that agency's hearing office or, as often referred to in other agencies, office of

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<sup>45</sup> Adapted from 26 U.S.C. § 7456 (1988) empowering Tax Court judges to punish for contempt. The Tax Court has been held to be a legislative court. See, e.g., *Continental Equities v. CIR*, 551 F.2d 74 (5th Cir. 1977).

administrative law. The Bankruptcy Court's Rule 9020 <sup>46</sup> providing for summary determination of contempt committed in the presence of the judge, and notice and hearing in the case of contempt not in the presence of the judge, might well serve as a model for regulations governing the Administrative Law Judge's contempt power.

Ultimately we must rely on the sound discretion of the ALJ in the exercise of these powers. Given the lack of extensive case law surrounding the contempt powers of other legislative court judges (*i.e.*, tax, etc.), it is unlikely that there will be a significant increase in litigation against the Agency. It is this author's firm belief that her colleagues will not violate the faith held in them by the Supreme Court when it extended to them judicial immunity. The Court believed that "the risk of an unconstitutional act by one presiding at an agency hearing" needed to be measured against the need for judicial independence. <sup>47</sup> We must also weigh the risk of an abuse of the contempt power against the need for the orderly administration of justice. Surely, the confidence of the Court in the Administrative Law Judge has been borne out, and thus, potential abuse should be of minimal concern.

### Conclusion

While it is clear to this author that the Administrative Law Judge has contempt power, this power is more limited than that of our nonadministrative counterparts sitting on the federal district court or appellate court benches. In order to both expand and solidify our contempt powers as presently operative, legislation should be enacted towards this end. Such legislation would comport with the right and the duty of the Administrative Law Judge to control the conduct of the hearing and would enhance the efficiency of the Social Security claims process <sup>48</sup> towards more directed and equitable proceedings.

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<sup>46</sup> 11 U.S.C. Rule 9020 (1988). This Rule is used here solely as a model for what form proposed regulations may take.

<sup>47</sup> See *supra* note 38 and accompanying text.

<sup>48</sup> This applies as well to any agency utilizing ALJs for its hearing process.